United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1011
& 75-1017

to be argued by ROBERT H. PLAXICO

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

ALPHONSE M. MEROLLA AND THOMAS MCNAMARA,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ROBERT H. PLAXICO,
Attorney,
Department of Justice,
Washington, D.C. 20530.

DAVID J. RITCHIE,
Special Attorney,
Brooklyn, New York.

INDEX

CITATIONS

Cases:

Cases: (Cont't)

Cases: (Con't)

Cases: Con't) Page

Cases: (Con't) Page

Statutes and Rules:

Miscellaneous:

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ISSUES PRESENTED

1. Whether the Hobbs Act, 18 U.S.C. 1951, is limited only to illegal practices of unions and union officials.

2. Whether the defendants' extortionate conduct affected commerce.

3. Whether the trial court's instructions on the commerce element of the offense were correct.

4. Whether the trial court's instructions as to assessing the credibility of the government's chief witness were correct.

5. Whether the defendants may challenge on appeal for the first time the authority of United States Department of Justice Strike Force Attorneys to present this case to the grand jury and, if so, whether an indictment is subject to dismissal when the evidence upon which it is based is presented to the grand jury by Department of Justice attorneys.

STATUTES INVOLVED

18 U.S.C. 1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section -
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT *

After a jury trial in the United States District Court for the Eastern District of New York (Dooling, J.), the appellants

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* Transcript References: Since the appellant McNamara has included the entire trial transcript within his appendix, we are providing, for the court's convenience, dual reference citations, for example, Tr. 1817, MA [McNamara's Appendix] 1955a. In addition, in view of the challenge to the credibility of the government's main witness, Harold Goberman (see infra, p. 41), we are specially denoting references to his testimony as Tr.G in order to demonstrate that most of his remarks were in fact corroborated; transcript references to other witnesses' testimony will be denoted "Tr."

were convicted of conspiring to violate the Hobbs Act, 18 U.S.C. 1951, 371. Appellant McNamara was sentenced to three years' imprisonment, all but three months of this term being suspended, and placed on probation for thirty-three months. In addition, he was fined $5,000. Appellant Merolla was also sentenced to three years' imprisonment, with all but three months of this being suspended, and placed on probation for five years. Two co-defendants, Alphonse Merolla (a different person from the appellant; the appellant was designated at trial as Alphonse M. Merolla) and John Deliso, were acquitted.[1/]

1. Introduction[2/]

The indictment brought against the defendants charged that they had conspired to obstruct commerce by extorting certain

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1/ The appellants, and DeLiso, along with John McNamara, Roco Merolla, and Angelo Merolla were originally tried in January of 1974 on the conspiracy charge. At this first trial, Roco and Angelo were acquitted while the jury was unable to decide as to the others. The appellants and DeLiso were then retried along with Alphonse Merolla, who was added as a defendant. Co-defendant John McNamara was also scheduled to be retried along with the others, but prior to trial the government successfully moved to sever his case as the government attorney intended to apply for a grant of immunity and call him as a prosecution witness. During the ensuing trial, however, John McNamara was not called to testify (Tr. 59-112, MA 174a-277a).

2/ We take issue with appellant Merolla's suggestion that testimony helpful to the defense was not necessarily rejected by the jury (Mer. Br. p. 4). As we discuss, infra, in Arguments I & II, the basic issues before the jury were whether property was extorted from one Harold Goberman and whether he was sufficiently involved in interstate commerce so that, as a matter of law, commerce was affected. As such, "[t]he general rule of application is that '[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it.'" Hamling v. United States, ___U.S.___, ___ (94 S.Ct. 2887, 2911), see also United States v. Andreadis, 366 F.2d 423, 428 (2nd Cir. 1966), cert. den., 385 U.S. 1001; United States v. Lozaw, 427 F.2d 911, 913 (2nd Cir. 1970).

properties from one Harold Goberman, a building contractor who through his construction activities in building an automobile sales and service facility was involved in ordering and utilizing various commodities which moved in interstate commerce (MA 15a).

The evidence adduced at trial showed that defendant McNamara owned McNamara Buick-Pontiac, a General Motors dealership (Tr. 1617, MA 1749a). Through another corporation, McNamara New-Cars, McNamara had acquired in the fall of 1971 a parcel of land at 5184 Nesconsett-Port Jefferson Highway, for the purposes of constructing a new dealership facility there (Tr. 1618-1620; MA 1750a-1752a).

At this same time, Harold Goberman was employed as an estimator by Len-Al Construction, his brother Allen Goberman's, company, building another automobile service facility near the McNamara land parcel. While working on this project, Harold Goberman met Thomas McNamara and the two agreed that the former should construct the new McNamara building. A formal contract between the two was effectuated on February 24, 1972 (Tr.G 261-266, MA 373a-378a).[3/]

3/ While it is not relevant to the ultimate disposition of this case, we note that the defendants have suggested that Goberman misrepresented himself as an officer of Len-Al, his brother's firm, in negotiating the contract (Mc Br. p. 4; Mer. Br. p. 5). It is correct that Allen Goberman initially thought that Harold was negotiating on behalf of Len-Al (Tr. 1219, MA 1347a). However, it is incorrect that McNamara, when he signed the construction contract, was unaware that the contract was with Goberman and the latter's corporation, Harmac corporation. The contract (Gov't Exhibit 11) was stated as being between "McNamara re-New-Cars, Inc." and "H. Goberman" and was signed by Goberman. In addition, the document contained a special provision that :
(Con't on page 5).

Initially, as construction on the McNamara facility commenced, relations between the two parties were quite amiable. However, differences soon arose. McNamara was unsure if sub-contractors were being paid and was not happy with the manner in which his structure was being built. For his part, Goberman thought that McNamara was interferring with his attempts to construct the building and did not think that he was honoring the requisitions soon enough (Tr. 862, MA 980a; Tr. 952, MA 1071a; Tr. 1157, MA 1281a; Tr. 1189, MA 1315a; Tr.1119a, MA 1318a; Tr. 1231, MA 1360a; Tr. 1202, MA 1328a). Emanuel Sfaelos, an attorney who handled the contract negotiations for Goberman, testified as to the deteriorating relationship as follows:

> Apparently, the father-son relationship ended, to the best of my knowledge, sometime I would say starting in May, around May 1st to 15th, when Harold complained to me as well as Mr. McNamara complained to me about each other, about the payments, Mr. McNamara was concerned about making sure that the payments were going to the proper parties, and Harold was concerned about obtaining payments and Harold Goberman was concerned about Mr. McNamara taking over the job, the air got a little heavy. Mr. McNamara was concerned about being ripped off and Harold was likewise concerned in a sense, and this is what he expressed to me, and the friendship that existed on the initial meeting, and let us say for a period of about a month, no longer existed. (Tr. 1544, MA 1675a)

3/ (Con't from page 4)

> This contract may be assigned only to a corporation of which contractor [Goberman] is sole stockholder, but no assignment shall relieve contractor of personal liability to owner hereunder.

In this connection, Harold Goberman's wife did not characterize McNamara as "very good" or "conscientious." The references in McNamara's brief to this effect (p. 9) refer to Allen Goberman's wife who, like her husband, was irritated that Harold had secured the contract for himself.

2. The Initial Threats And The First Beating Of Goberman on June 5, 1972

In late May, appellant Merolla visited the job site and threatened Gary Taibbi, Goberman's construction superintendant. Taibbi described the threat as follows:

> The individual who identified himself as Al Merolla said to me, "We can never get hold of your boss, Harry Goberman," with slurs[4/] thrown in, "We know where you live." We owe something to the effect -- I or we have a 25% interest in this place, and he said "If it's not done correctly, and if it's not done, you know, done on time, needless to say, McNamara can't sell cars and make money," and they in turn can't get their 25%. He said words to the effect, as I mentioned, "we can never get a hold of Harry Goberman, but we know where you live and we'll come looking for your fucking ass. You can consider this a threat, go to the police, the F.B.I., I don't give a shit -- I'm Al Merolla. (Tr. 866, MA 984a)

A few days later, after Taibbi had rebuffed McNamara when the latter questioned his method of pouring cement, Taibbi observed McNamara and appellant Merolla, along with some others, standing at a near-by car. Appellant Merolla called Taibbi over and:

> you know, giving me verbal abuse saying, "we don't want you to give the old man any more fucking lip. We don't want you to argue with him any more. You listen to him, dont' give him any more shit." Words to that effect. "If you do, we're going to come looking after your ass. We know where you live." (Tr. 863, MA 981a).

4/ To avoid prejudice, the trial court ruled that the prosecutor should caution his witnesses against revealing certain anti-semetic sobriquets ("kike, jew bastard", etc.) utilized by the appellants (Tr. 11-17; MA 125a-131a).

On June 5, appellant Merolla and John Deliso returned to the site and told Taibbi to contact Goberman by phone; Taibbi did so and asked Goberman to come down as, in his view, "McNamara's hoods are here " Tr. 867-88, MA 985a-986a; Tr.G 289-90, MA 401a-402a. Goberman came down and was confronted by Merolla:

> I walked in. Merolla said, spoke to me and he said, "You got problems on this job. You better get them straightened out."
> I says, "What do you mean by that?" He says, "You got problems, get them straightened out. We're 25% owners and we're connected."
> I says, "What do you mean connected?" He says, "Well, we're Columbo." I says, "What do you mean by that?" (Tr.G 291-92, MA 403a-404a)

Then, at Merolla's order, Goberman contacted a Mr. Salvatore Spatarella and a meeting between Spatarella, Goberman, Merolla, and Deliso was arranged later that morning at a local restaurant (Tr.G 297, MA 409a). At the meeting, Merolla related to Spatarella that he was a twenty-five percent partner and that Goberman had "problems" on the job. Goberman indicated that McNamara's requisition payments were behind to which Merolla responded that he would guarantee them (Tr.G 300, MA 412a). Another meeting was then arranged for later that day (Tr.G 302, MA 414a).

At this second meeting, there was present, in addition to the above four individuals, Roco Merolla, Angelo Merolla, and Alphonse Merolla (the other Alphonse, known to Goberman as "Fat Nicky"). When Goberman questioned appellant Merolla's ability to guarantee his payments "[t]hen he got mad at me, picked up a knife off the table and stuck it in my side and he says "I ought to kill you here and now " (Tr.G 305-307, MA 417a-419a). Spatarella

calmed Merolla down and Goberman was told to return to the job site (Tr.G 307-309, MA 419a-421a).

Goberman did return to the site, after asking his brother Allen to join him. After the two arrived there, Harold Goberman received a phone call ordering him to come to the old McNamara showroom (Tr.G 309-310; MA 421a-422a; Tr. 1219-1220, MA 1347a-48a). He was visably upset during this time (Tr. 1222, MA 1350a).

At the McNamara showroom, Harold and Allen went into an office and were met by Thomas McNamara, his son John, appellant Merolla, Angelo Merolla, Roco Merolla, DeLiso, and Fat Nicky. An argument on the construction ensued and at one point Thomas McNamara said, "I'll kill you." Allen was then told to leave the room (Tr.G 311-312, MA 423a-424a; Tr. 1231, MA 1360a; Tr. 1240, MA 1369a). Harold Goberman described the conversation:

> Mr. Thomas McNamara told them I was behind. I said, "Well, the money is behind."
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> Then Mr. Thomas McNamara says, "He did get his money." and I says, "I did not." He says, "I'm a goddamn liar."
>
> ***
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> Then I started getting punched and I went down. Then I started getting kicked around a little. By the -- I guess you could say all the people in the room.
>
> Then I was picked up, put in a chair by the window on the right-hand side of the room and Mr. Alphonse Merolla says, "give me the gun," and then John Deliso handed him the gun. Then he stuck the gun down my throat, which was a .38 caliber revolver, and said, "I ought to kill you here and now." (Tr.G 313, MA 425a).

From outside the room, Allen heard "... a commotion of a person or persons being shoved around, chairs being knocked around" (Tr. 1233, 1362a).

At this point John McNamara claimed that "[h]e (Goberman) has four thousand dollars in his account. I want it" (Tr.G 313-314, MA 425a-426a). When Goberman stated that he had only fourteen hundred dollars, he was ordered to write out a check for thirteen hundred dollars to Thomas McNamara (Tr.G 314, MA 426a)(Gov't Exhibit 15). At this point Thomas McNamara demanded that Goberman sign over to him a trailer located at the job site which Goberman had purchased on commencing the project (Tr.G 316, MA 428a). Goberman then signed the registration and bill of sale for the trailer (Tr.G 317, MA 429a). He was given to understand that if he had not transferred the check and trailer as ordered, he would be killed (Tr.G 318, MA 430).

After the beating of Harold Goberman, his brother entered the room and saw a gun being passed between the appellant Merolla and DeLiso (Tr. 1242-43, MA 1371a-72a). He also heard Thomas McNamara tell his son to "[g]et him to sign this registration, have him sign the registration over for the trailer" (Tr. 1254, 1385a).

The group then went to a near-by bank where the check was cashed. When they returned to the showroom, Goberman departed (Tr. G. 321-322, MA 433a-434a).

3. Events Between June 5 and June 28

After extracting these funds from Goberman, on June 8, 1972, McNamara directed his attorney, Desmond O'Sullivan, to deliver a check to Goberman for $2,446 to cover Goberman's payroll, on condition that Goberman would sign an agreement that he would use the funds solely to pay his employees and would acknowledge that the money advanced would be set off against a future requisition (Tr.G 608, MA 723a; Tr. 1159-65, MA 1283a-89a; Def. Exh. X, Y, AF). Goberman met with O'Sullivan and signed this agreement. At this time, arrangements were also made to provide Goberman's attorney, Sfaelos, with other moneys to be held in escrow, pending completion of work by various subcontractors, because McNamara did not believe that Goberman was making timely payments to the subcontractors (Tr.G 654, MA 770a; Tr. 1160, MA 1284a) Under this arrangement on June 16, 1972, O'Sullivan took a check for $32,610 (Def. Exh. Z), payable on McNamara's account to Sfaelos who acknowledged receipt and pursuant to an escrow form (Def. Exh. AX), agreed to pay certain enumerated contractors (Tr.G 639-40, MA 755a-756a; Tr. 1537-38, MA 1667a-1669a; Tr. 1185-86; MA 1311a-1312a).[5/]

5/ With due respect to appellant Merolla, the discussion within his brief as to these payments is not a correct reading of the admittedly complex trial record. Merolla's brief indicated (p. 15) that a check for $32,000 was given to Goberman by McNamara on June 5 (the day of the first beating); it also states that O'Sullivan delivered checks to Goberman for $2446 on June 8, for $36,000 on June 15, and for $32,610 on June 16. As we discuss above, the June 8, check was given as described in Merolla's brief, although under the restricted conditions mentioned above. However, the references to the other three checks that appellant Merolla describes as being given to Goberman really were all referring only to the one check for $32,510 (Def. Exh. Z), which was given to Goberman's (Con't on page 11)

During this same period, however, McNamara was endeavoring to relieve himself of the contractual arrangement between himself and Goberman. Accordingly, at McNamara's behest, his attorney, O'Sullivan arranged a meeting on June 9 between himself, McNamara, and a Mr. Jack Erlich, who was the chief of the frauds bureau of the local district attorney's office. The purpose of this meeting was to inform Erlich of McNamara's belief that Goberman was not properly paying off his subcontractors and to try to generate a fraud charge based on false requisitions against him (Tr. 1152-53a, MA 1275a-77a; Tr. 1201-04, MA 1327a-30a). No action was taken by the district attorney's office as a result of this complaint (Tr. 1153a, MA 1277a).

4. The Beating And Extortion Of June 28 Which Sought To Divest Goberman Of His Interest In The Construction Contract

The relationship between Thomas McNamara and Goberman continued to deteriorate during the ensuing two weeks. At one point, when Goberman was pouring concrete, McNamara approached and stated that "[y]ou had better do what you are told to do or you are going to get it again" (Tr.G 326, MA 438). On another occasion, as Taibbi testified:

> Harry is in the office and he was sitting down at my desk and Tom McNamara kept on yelling at him, cursing at him, calling him all kinds of names, vulgar names all kinds of names.
>
> ***

5/ attorney to place in escrow for payment only to specific contractors (Def. Exh. AX). See Tr. 1185-86, Tr. 1537, Tr.G 639-640.

His son John told him to calm down. The foreman told him to calm down, he'll have a heart attack.

He turned around and out of the clear blue sky he says, "I don't give a shit if I have a heart attack or anything, Harry. If anything should happen to me, I've got a contract out on you, you little bastard." (Tr. 876-77, MA 994a-995a; see also Tr.G 326, MA 438a).

On June 20, McNamara arranged to have the job site "posted" by local authorities, which prevented any further work on the project (Tr.G 582, MA 696a). Four days later, he sent Goberman a letter (Def. Exh. AQ) purporting to unilaterally terminate the contract. On June 26 or 27, McNamara called Goberman's attorney, Sfaelos, who indicated, however, that Goberman would not voluntarily cease his contractual relationship vis a vis the project and that the dispute between the two would have to be resolved by arbitration or in court (Tr. 1506, 1637a).

On June 28, appellant Merolla and Fat Nicky met Goberman and appellant told Goberman that he was going to McNamara's place in Port Jefferson (Tr.G 327, MA 439a). On arriving at the dealorship and proceeding inside, Merolla informed Goberman that he would sign a contract release and be given $25,000. Also present were John McNamara, Roco Merolla, Angelo Merolla, John DeLiso, and Fat Nicky (Tr.G 328-329, MA 440a-441a). Goberman was told that he would sign this release and document acknowledging receipt of $25,000 (Gov't Exh. 16 and 17, quoted at Tr. 333, MA 445a and Tr. 338, MA 450a).[6/]

6/ This release had been prepared at McNamara's behest by J. Timothy Shea, one of his attorneys, on June 6 (Tr. 1622, MA 1754a).

Goberman remonstrated whereupon "I was beaten up and after I was beaten up, I said I would sign the release" (Tr.G 329, MA 441a). He feared that if he protested further, he would be killed (Tr.G 340, MA 452a). Consequently, the documents were brought in by Alex Griazdowski, who worked for McNamara, and Goberman signed them; they were then notarized by Griazdowski (Tr.G. 330, MA 442a).

Later, after Griazdowski had left,

> ... then I started to get a good beating. I was stripped and called a rat bastard, "You went to the D.A.," which I denied.[7] "You got a bug on you." Which I said no. Then I was -- Merolla took a gun out, pointed it at me and said "I'm going to kill you and bury you in a lime pit." (Tr.G. 341, MA 453a).

After this beating ceased, Goberman got dressed and a cab was called for him. He was driven to where he had left his automobile and he started to drive to his brother's place of business. He was stopped en route by two local policemen who took him to the local station house on determining that he was driving with an expired license under the name of Harry Masterson (Tr.G 343, MA 455a).

On the way to the station, one of the officers observed that his leg movement was impaired (Tr. 1698-99, MA 1832a-33a). Sfaelos, Goberman's attorney, secured his release from the police station. He observed on leaving with Goberman that he was limping and that his jacket was torn. Goberman then

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7/ Goberman had complained to Thomas Gill, a member of the Suffolk County Police Department, after the June 5 beating that he had been threatened by "a bunch of goons" (MA 172la, Tr. 1590).

asked him to assist him in walking to Sfaelos' car and related that he had been compelled to sign the contract release (Tr. 1503-05, MA 1634 -36a). The construction superintendent Taibbi also saw Goberman later that day and observed bruises on his face (Tr.9915, MA 1033a). Goberman visited a doctor later that day who also testified that he observed a variety of "lesions most likely inflicted by traumatic action of blunt body..." (Tr. 1116, MA 1237a).

Goberman, as he testified, never did receive the $25,000 he was forced to acknowledge (Tr.G 343, MA 455a). This was affirmed by J. Thimothy Shea, another of McNamara's attorneys at that time, who testified that when McNamara was subsequently sued civilly by Goberman over the contract dispute and beatings he did not deem it advisable to offer the contract release in defense:

> [b]ecause this was based on conversations that I had with my client and my legal advice at that time was that the document was legally unenforcable and should not be used. (Tr. 1642, MA 1775a)
>
> * * * *
>
> The consideration which I believe something like $25,000, which was the figure, had not passed hands from McNamara to Harmac Contracting or Harold Goberman. (Tr. 1643, MA 1776a) 8/

8/ On the advice of an attorney, apparently in hopes of protecting his position, Goberman the next day sent a letter to McNamara indicating that he would terminate the contract if proper requisition payments were not made (Tr. G 578-79a, MA 691a-693a).

5. The Government's Investigation

Goberman contacted federal agents on August 28 and spoke at that time with Richard McMullen, an FBI Agent (Tr. 1445, MA 1576a). Thereafter, on Feburary 15, 1973, at a meeting between agent McMullen, McNamara, two of his attorneys, and a government attorney, McNamara claimed that he had been threatened by Goberman some eleven times, commencing on April 27 [9/] (Tr. 1368, MA 1499a). However, when McMullen asked him if he could produce any witnesses, McNamara responded in the negative (Tr. 1375, 1506a).[10/] Later in the interview, McNamara

9/ This is the transcript reference, taken out of context, we submit, upon which there is based the claim that McNamara was threatened eleven times by Goberman (Mc Br. p. 10). The few specific allegations of threats made in McNamara's brief (pp. 9-10) occurred as follows. One of the defense witnesses claimed that he saw Goberman spit at McNamara (Tr. 1818, MA 1956a); however, Goberman denied this (Tr.G 518, MA 630a). Allen Goberman testified that Harold "threw a punch" at McNamara at the beginning of the June 5 meeting only after McNamara "went to kick him." (Tr. 1270, MA 1400a). The so-called threats to hit McNamara with a pipe and push him down a latter were made to Eugene Brosi - a police officer who was moonlighting by working for McNamara as a watchman - and not directly to McNamara (Tr. 1826-27, MA 1965a-66a, Tr. 1830, MA 1969a). Goberman also made a so-called threat to Thomas Gill, the local policeman mentioned above, after complaining to him about the June 5 beating (Tr. 1594, MA 1725a). The only evidence of a direct threat was explained by James Freda, a defense witness, who claimed that Goberman, during a heated argument with McNamara over the placement of a pipe, "... there was angry words, you know, and Harry said he would bury Mr. McNamara in the hole that I had dug" (Tr. 1817, MA 1955a). As mentioned above, McNamara did not proffer this witness when asked by government investigators.

10/ McNamara also admitted to the government investigators that he had not sought assistance, in the face of such alleged threats, from his son Thomas McNamara Jr., who was then the acting United States Attorney for the Eastern District of North Carolina (Tr. 1379, MA 1509a).

claimed that he had informed his attorney, O'Sullivan, of the threats and that at a subsequent meeting between himself, O'Sullivan, and John Erlich of the local district attorney's fraud bureau (discussed supra, p. 11) the latter had been similarly informed. O'Sullivan, however, testified at trial that McNamara had told him only that he suspected Goberman might be guilty of fraud with respect to the contract requisitions. Though McNamara wanted Goberman off the project, he never, in his consultations with O'Sullivan, mentioned any threats by Goberman, which could themselves, had they occurred, have constituted criminal offenses (Tr. 1150-51, MA 1273a-74a; Tr. 1191-96, MA 1317a-1322a; Tr. 1200-1201, MA 1326a-1327a).[11/] Consequently, during the meeting with Erlich (contrary to the suggestion in McNamara's brief, p. 10) as both O'Sullivan and Erlich testified, no mention of any threats were proffered to the local prosecutor (Tr. 1154, MA 1278a; Tr. 986-987, MA 1106a-1107a).

Agent McMullen also testified that prior to the February 15 meeting, Shea, one of McNamara's attorneys, offered on behalf

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11/

> A. He advised me that he had some violent arguments with Mr. Goberman on the job site, but he never told me specifically that he had been threatened, specifically that he had been spat upon or specifically that he had been assaulted.
>
> * * *
>
> Q. Isn't there a lot of differences between an argument and a threat in your mind?
>
> A. In mind, yes. (Tr. 1194-95, MA 1320-31a)

of McNamara to produce any documents pertaining to the construction agreement (Tr. 1474, MA 1605a). When McMullen asked him at this time to include the contract release (Gov't Exhib. 16), Shea responded that there was no such document (Tr. 1475, MA 1606a). Later, however, when the government investigators determined through the notary Gniazdowski that Goberman was right in asserting that such a document did exist, Shea altered his story to indicate that the contract was no longer in existence but had been destroyed (Tr. 1478-1482, MA 1609a-1613a; Tr. 1422, MA 1552a; Tr. 1384, MA 1514a). At trial, Shea admitted that he had drafted the contract release agreement (Tr. 1622, MA 1754a, Tr. 1627-29, MA 1759a-60a), and that he was shown the original, fully executed as described by Goberman, by John McNamara in August or September of 1972 (Tr. 1628, MA 1760a). A few days later, at John McNamara's request, Shea returned the original and all copies over to him (Tr. 1629, MA 1762a).[12/]

McMullen also testified that after Merolla's arrest, the latter in response to a question stated that he did not know an individual named Harry Goberman (Tr. 1402, MA 1532a). However, a business card taken from his wallet had Goberman's name and telephone number written upon it (Tr. 1402-03, MA 1532a-33a; Tr. 1464, MA 1595a).

12/ The government sought to subpoena the contract release, but it was not produced (Tr. 1380-81, MA 1501a-11a); later pursuant to a warrant executed in April, 1973, McNamara's premises were searched, but the document was not found. A copy was eventually found at the Marine Midland International Bank, where McNamara did business.

6. The Interstate Commerce Element

The evidence at trial showed that Goberman, through his orders for building material, was heavily involved in interstate commerce which involvement was terminated through the appellants' having forced him from the building project. In addition, the facility he was constructing, an automobile dealership, was intended to receive products from out of state.

For instance, the office manager for Hunt Transporation in Omaha, Nebraska, testified that electrical supplies were delivered to the job site from out of state. These good, received on April 26, had been ordered by Merkel Electric, with whom Goberman had contracted to install lighting apparatus on the job site. Merkel Electric took its personnel off the construction site when it was posted on June 20. However, complete installation of the electrical equipment was effectuated on July 27, 1972, after Goberman had been forced off the project (Tr. 171-180, MA 286a-295a; Tr. 221-232, MA 335a-346a).

Through Fireproof Products, Inc., Goberman ordered various steel materials (Tr. 186, MA 301a). Fireproof, on receiving one of Goberman's orders, arranged for Guille Steel Products Company of Virginia Beach, Virginia, to ship steel joists to the job site (Tr. 188-193, MA 303a-308a; Tr. 198-200, MA 312a-314a). On other orders by Goberman to Fireproof, that Company arranged with Rollform Products Inc., a New York Company, to have steel roof decking shipped to the job site from a plant in Malvere, Pennsylvania (Tr. 201-205, MA 315a-318a).

Goberman also arranged through a subcontractor, Warren Brady, to obtain overhead garage doors from the Armor-Like Door Manufacturing Company in New Jersey (Tr. 1545-47, MA 1676a-78a; Tr. 1556, MA 1687a; Tr. 1558-59, MA 1689a-90a).[13] These doors were ordered specifically for the McNamara job and were not part of Brady's general inventory. Installation of these doors commenced in May, but was not completed until July 14, 1974 after Goberman was off the job (Tr. 1554, MA 1685a).[14]

7. The Jury Charge

The trial judge in his instructions to the jury explained that if a conspiracy to extort were found and if the construction site and completed building received goods from interstate commerce, then as a matter of law the jury could find that commerce had been affected. This was because any interference with a building contract so related to interstate commerce would necessarily affect that commerce.[15]

13/ This work was temporarily discontinued on June 26. On that date, McNamara called Brady and stated that "The job is shut down because I am having a dispute with Mr. Goberstein [sic]" (Tr. 1553, MA 1684a).

14/ The facility which Goberman was constructing, until forced off the project, was intended to receive and sell, therefrom, automobiles transported there in interstate commerce. Thirty to forty General Motor cars per month were shipped to McNamara in the years 1972 and 1973. These cars were delivered to McNamara's old showroom until the new one was finally completed in September of 1972 (Tr. 1577, MA 1709a, Tr. 1579-80, MA 1711a-12a). This evidence also showed that commerce was affected by the McNamara-Goberman relationship.

15/ The essential elements of the charge of the indictment all of which the Government must prove beyond a reasonable doubt or else you must acquit the defendant whose case you are considering are the following:

(Con't on next page)

15/(Con't from page 19)

First, that physical violence and threats of physical injury were used to induce Harold Goberman to do one or more of the following things, that is, to sign and deliver the $1,300.00 check, to sign and deliver the bill of sale of the trailer, or to sign and deliver the cancellation of the construction contract;

Second, that two or more of the defendants named in the indictment conspired so to use violence or threats of injury to obtain the check or bill of sale or contract cancellation or any two or all three of these instruments from Goberman for the purpose of preventing Goberman and MarMac Contracting Corporation from continuing with the construction of the building for McNamara Buick;

Third, that the effect of the use of the acts of the conspirators directed against Goberman would in some degree or manner delay, obstruct or affect in some way interstate commerce or other movement of any articles in interstate commerce: and

Fourth, that the defendant whose case you are considering joined the conspiracy knowing its terms and its purpose and that it contemplated the use of physical violence and threats or physical injury in order to induce Harold Goberman to act as the conspirators directed. (Tr. 2103-04, MA 225la-52a)

* * *

So here, if you find that the first and second essential elements have been proved beyond a reasonable doubt, and if you further find that (a) automobile parts were regularly being shipped from outside New York to McNamara Buick-Pontiac in Port Jefferson and were to be shipped to the Nesconset Highway site as soon as the new building was completed, or (b) if you find that building materials from outside New York were ordered specifically for the Nesconset Highway job and had been shipped to the job site for erection

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ARGUMENT

I. THE HOBBS ACT, 18 U.S.C. 1951, IS NOT LIMITED TO VIOLATIONS BY LABOR UNIONS AND LABOR OFFICIALS.

Appellant McNamara's first and primary contention, characterizing Section 1951 as an "anti-labor racketeering" statute (Mc Br. p. 18), is that the Hobbs Act should properly be invoked only "against illegal practices of unions" (Mc Br. p. 20). This view of the statute, we submit, is incorrect; it is contrary to the facial reading of the enactment, its legislative history and is at odds with the standard judicial interpretation of the statute's terms.

On its face, as the Supreme Court held in Stirone v. United States, 361 U.S. 212 (1959), the statute encompasses all acts of extortion which affect commerce. While Stirone involved prosecution of union personnel, the Court did not qualify the broad scope of federal jurisdiction it found embodied within the statute:

15/ (Con't) as part of the building, and all had been delivered to the job but had not been completely erected on the job site by June 28, then as a matter of law you may find that the Government has established the third essential element beyond a reasonable doubt. That is because any interference with the performance of a building contract involving the use of materials ordered and shipped from out of the state specifically for that building and with the identity of the person or company who would complete the contract performance might be found by you in fact in some way or degree to affect the completion of the building and the time of the shift of deliveries of automotive parts in commerce from Port Jefferson to Nesconset Highway. (Tr. 2108-09, MA 2256a-57a)

> The Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence. The Act outlaws such interference "in any way or degree." Id. at 212

The original predecessor to Section 1951, namely Pub. L. 73-376, 48 Stat. 979, was enacted in 1934. Ignoring the legistative history of this enactment, appellant McNamara emphasizes only that when Congress dealt with the statute in the 1940's - pursuant to its eventual amendment of the provision in Pub. L. 79-486, 60 Stat. 420 - the legislative debate focused upon the effect of the amendment upon labor unions. This was natural because the 1946 enactment was solely an amendment to the original 1934 legislation and was primarily intended to reverse the Supreme Court's decision in United States v. Local 807, 315 U.S. 521 (1942), holding that certain labor activities fell without the scope of the 1934 legislation.[16/] Since the 1946

16/ 48 Stat. 979 provided in pertinent part as follows:

> * * *
>
> Sec. 2 Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce -
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including however, the payment of wages by a bona-fide employer to a bona-fide employee;... [shall be guilty of an offense.] (emphasis added). (Con't)

enactment was just an amendment to the original legislation calculated to deal with a narrow fact pattern, it is to the original legislation and legislative history thereof to which one must turn in order to ascertain the full scope of Section 1951.

Analysis of the original 1934 legislation demonstrates that the Congress sought to exhaust its full constitutional power over commerce and to that end sought to include within federal jurisdiction all endeavors to affect commerce involving robbery or extortion. The original Act was one of thirteen bills submitted by the Copeland Committee (see discussion in Local 807, supra, at 528-529), reflecting the Congressional purpose to reach the proscribed types of conduct to the full extent that the commerce power permits.

The Senate Report accompanying the bill includes a memorandum from the Department of Justice stating as follows the broad purposes of the legislation:

16/ (Con't)
60 Stat. 420, amending the above provision, provided in pertinent part as follows:

> Sec. 2 Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

The exception in the 1934 legislation, underlined above, was interpreted by the Supreme Court in Local 807 to exclude even extortionate activity of certain trucking unions in New York who exacted donations - under the guise of wages for unwanted services which were often not even rendered - from trucks driving into the city from outside localities. By eliminating the exception present within the 1934 enactment, Congress evinced its intent that the proscription of the law include attempts by labor unions to exact wages for unwanted services which were imposed through extortionate pressures. See H.R. Rep. No. 238, 79th Cong., 1st Sess. (1945); United States v. Green, 350 U.S. 415 (1956).

> In the past such persons have been prosecuted in the Federal courts for incidental violations of law, such as mail frauds or income-tax evasions. The nearest approach to prosecution of racketeers as such has been under the Sherman Anti-trust Act. This Act, however, was designed primarily to prevent and punish capitalistic combinations and monopolies, and because of the many limitations engrafted upon the act by interpretations of the courts, the act is not well suited for prosecution of person who commit acts of violence, intimidation, and extortion.
>
> * * *
>
> The accompanying proposed statute is designed to avoid many of the embarassing limitations in the wording and interpretation of the Sherman Act, and to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers. Such restraints if accompanied by extortion, violence, coersion, or intimidation, are made felonies, whether the restraints are in the form of conspiracies or not. The proposed statute also makes it a felony to do any act "affecting" or "burdening" such trade or commerce if accompanied by extortion, violence, coersion, or intimidation. S. Rep. 532, 73rd Cong. 2nd Sess. p. 1 (1934)

Indeed, far from viewing the bill as directed solely against labor unions, Senator Copeland, the bill's sponsor, perceived the legislation such that "... we hope will add to the protection of the American people against crime and the criminal" (78 Cong. Rec. 448)[17/].

17/ See also the comments of Congressmen Oliver: "This is merely the creation of an extortion statute against these who extort money by force or violence from those engaged in interstate commerce" (78 Cong. Rec. 11402).

The courts have accepted this view of the broad jurisdictional scope embodied within Section 1951 to an extent which fully belies appellant McNamara's notion that the statute has been applied "consistently" to union activities. In this circuit, the statute has been applied to diverse fact situations involving extortion affecting interstate commerce. In United States v. DeMasi, 445 F.2d 251 (2nd Cir. 1971), cert. den., 404 U.S. 882, the defendant and various associates caused repeated disturbances at a local bar-restaurant - which received liquor and meat from out of state - in an attempt to secure the managership of the facility and to eventually force out the owner. In United States v. Tropiano, 418 F.2d 1069 (2nd Cir. 1969), cert. den., 397 U.S. 1075, a refuse collector who purchased his trucks and trash containers from out of state was threatened with bodily harm in order to dissuade him from soliciting further business in certain areas. Finally, in United States v. Augello, 451 F.2d 1167 (2nd Cir. 1971), cert. den., 405 U.S. 1070 the owner of a Happy-Burger restaurant which received its meat supplies from New Jersey was coerced into making protection payments to the defendant. This prosecution was warranted, the court observed, [g]iven the sweeping power of Congress under the commerce clause ..." Id. at 1169.

Other courts have also applied Section 1951 to equally variegated situations. See United States v. DeMet, 486 F.2d 816 (7th Cir. 1973), cert. den., 416 U.S. 969 (local policemen demanded protection money from liquor store owner who received supplies from interstate commerce); United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. den., 417 U.S. 968 (same); United States v. Pacente,

503 F.2d 543 (7th Cir. 1974), cert. den., ___U.S.___ (same); United States v. Shackelford, 494 F.2d 67 (9th Cir. 1974), cert. den., 417 U.S. 934 (defendant attempted to extort money from airline, causing flight delay, by threatening bomb explosion); Battaglia v. United States, 383 F.2d 303 (9th Cir. 1968), cert. den., 390 U.S. 907 (defendant threatened owner of bowling alley in order to persuade him to place defendant's coin operated pool table, purchased in interstate commerce, in the establishment); United States v. Addonizo, 451 F.2d 49 (3rd Cir. 1972), cert. den., 405 U.S. 936 (city officials secured kickbacks from local contractors who received their materials from interstate commerce); United States v. Price, 504 F.2d 1349 (4th Cir. 1974)(city council chairman required payment before granting occupancy permit for new motel); United States v. Biondo, 483 F.2d 635 (8th Cir. 1973) cert. den., 415 U.S. 947 (employees of produce seller demanded payments on threats of running up business bills for which owner would be responsible); United States v. Mitchell, 463 F.2d 187 (8th Cir. 1972), cert. den., 410 U.S. 969 (civil rights worker threatened appliance retail outlet receiving goods in interstate commerce to force hiring of a black employee); United States v. Crowley, 504 F.2d 992 (7th Cir. 1974)(bowling lane owner who received supplies from out of state forced to provide protection money to police); United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974)(city alderman required payments for not opposing zoning changes which would permit construction of buildings whose materials came from interstate commerce); United States v. Nakaladski, 481 F.2d 289 (5th Cir. 1973), cert. den.,

414 U.S. 1064 (defendant charged usurious interest rate on loans to grocer who fell behind on payments to suppliers); United States v. Nadaline, 471 F.2d 340 (5th Cir. 1973), cert. den., 411 U.S. 951 (manager of photo finishing company engaged in interstate commerce beaten by previous employer of new employee in order to dissuade him from maintaining new employee in his hire); United States v. Amato, 495 F.2d 545 (5th Cir. 1974), cert. den., ___ U.S. ___(defendants sought by threats, money and employment from restaurant-bar which received liquor and meat supplies from interstate commerce); United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), cert. den., 404 U.S. 1058 (state officials demanded payments from insurance companies and small loan companies as condition of their doing business in the state).

Those cases cited by McNamara, namely United States v. Maze, 414 U.S. 395 (1973), United States v. Archer, 486 F.2d 670 (2nd Cir. 1973), and United States v. Del Toro, slip op. docket no. 74-2021 (2nd Cir., decided February 27, 1975), do not undermine these numerous holdings recognizing the broad federal jurisdiction embodied in Section 1951. These three cases, in fact, involve interpretations of other statutes, more narrowly drawn than Section 1951, in which it was found that the conduct charged did not fall within the ambit of the respective statute involved. In Maze, the defendant had purchased goods with a stolen credit card and and was charged with mail fraud (18 U.S.C. 1941) which prohibits use of the mails for the purpose of executing a fraudulent scheme; the fact that those honoring the stolen credit card sent the receipts to the bank through the mail was not seen as a use of the

mails for executing a fraudulent scheme, because the scheme to defraud was complete upon receipt of the goods or services. In Ancher, the defendants were charged with violating the Travel Act, (18 U.S.C. 1952) which prohibits the use of interstate facilities to further an unlawful activity; their convictions were reversed because the crime involved, bribery of a local district attorney, ultimately resulted in the use of an interstate facility, i.e., a phone only because a federal undercover agent purposely went out of state in order to receive phone calls from the defendants. The Travel Act was not meant "... to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present." Id. at 682. Finally, the Del Toro case involved a prosecution for bribery of a federal official (18 U.S.C. 201(b)(1)). The individual bribed, however, was an employee of the local city government which received some funding from the federal government. This court held that the Congress had not intended such a local official to be included within the general terms of Section 201(b)(1), particularly in light of the fact that in other legislation, the Congress had made specific provisions for certain local and state employees when involved with federal programs.

In the instant case, by contrast, the relevant statute broadly prohibits conduct which "... in any way or degree obstructs, delays, or affects commerce ..." Through his construction activities, Goberman was heavily involved in commerce and thus, as we explain more fully below, commerce was affected when he was forced off the McNamara job site.

Nor does United States v. Enmons, 410 U.S. 396 (1973), cited by Merolla, bar application of Section 1951 to the facts of the instant case. In Enmons, certain union workers, pursuant to a strike for higher wages, were accused under Section 1951 of committing various acts of violence against their employer's property in order to coerce the company into complying with their wage demands. These circumstances, the Court held, did not fall within the ambit of Section 1951, because Congress by enacting the narrow and specific amendment to the statute in 1946 did not intend to include incidental violence attendant upon legitimate strike efforts within the coverage of the statute. Enmons is predicated upon the Court's continuing sensitivity, as manifest also in Local 807, supra, to the disinclination of the legislature to wholly envelop union activities within the panoply of the Hobbs Act. Accordingly, "... it is clear that the Act does not apply to the use of force to achieve legitimate labor ends" Enmons, supra, at 401.

> But by eliminating the wage exception to the Anti-Racketeering Act, the Hobbs Act did not sweep within its reach violence during a strike to achieve legitimate collective-bargaining objectives. It was repeatedly emphasized in the debates that the bill did not "interfere in any way with any legitimate labor objective or activity"; [footnote omitted] "there is not a thing in it to interfere in the slightest degree with any legitimate activity on the part of labor people or labor unions ..." [footnote omitted] And Congressman Jennings, in responding to a question concerning the Act's coverage, made it clear that the Act "does not have a thing in the world to do with strikes" (emphasis added). Id. at 404. 30/

30/ See also Congressional debate quoted in Enmons at 405-406.

The reading which Merolla seeks to impose upon Enmons - essentially that whenever any defendant entertains a theoretically legitimate objective then a Hobbs Act prosecution may not follow regardless of the brutal ends utilized to achieve the objective - is far too broad an interpretation of that case, and would effectively eviserate the statute. In Tropiano, supra, and Nadaline, supra, the respective defendants' ends were certainly legitimate, namely the acquiring or retention of customers for themselves. However, Enmons does not hold, we submit, that the means utilized to achieve these ends (force and threats of force to prevent competitors from soliciting business or hiring certain employees), are not indictable under Section 1951. See also DeMasi, supra, where the defendants' ends, employment and eventual ownership of a club were legitimate but the means utilized included frightening away clientele through creating disturbances at the club. Indeed, in almost any prosecution under Section 1951, the defendant's goals can be characterized as legitimate (i.e., a city contract, a building permit, etc.) and it is only the means which bring the conduct within the reach of the statute.

The appellants' case is no different than any of these other Section 1951 prosecutions. If McNamara was not content with Goberman's performance of the contract, his proper remedy was to seek redress within the courts or by other legitimate means. By joining with Merolla and forcing Goberman off the building project through the use of force, however, commerce was affected in a manner forbidden by Section 1951, namely through extortion.

II

THE APPELLANTS' EXTORTIONATE ACTIVITY DID AFFECT COMMERCE

The appellants also contend that the government failed to prove guilt of a Hobbs Act violation beyond a reasonable doubt because there was inadequate proof that their actions caused a delay in the final completion of the automobile facility. (Mc Br. p. 34; Mer. Br. p. 39). The issue at hand, however, is not whether or not the building was completed in a timely fashion, but whether the extortionate conduct of the appellants "in any way or degree" affected commerce. Under the evidence adduced at trial, it was established beyond cavil their conduct did so affect commerce in several ways.

First, appellants' extortionate activities affected Goberman's construction business which was engaged in commerce. Goberman's assets were depleted by his being forced to turn over the $1300 and the trailer to McNamara.[31/] They were further depleted when he was forced to yield his rights under the contract. From this, the conclusion is inescapable that commerce was affected,

31/ The extortion of the $1,300 and construction trailer cannot be seen as reversed by the fact that after June 5, McNamara transferred the two checks for $32,610 (Def. Exh. Z) and $2,446 (Def. Exh. Y). As noted in our Statement, (see p. 10) the check for $32,610 was placed in escrow with Goberman's attorney to pay off certain enumerated subcontractors (Def. Exh. AX). Similarly, on receiving the $2,446 check by McNamara's attonney, Goberman was required to sign a document agreeing to utilize that money to pay the salaries of certain employees (Def. Exh. AE).

for it has been frequently held that when the victim of extortion commonly purchases products which have travelled in interstate commerce, as did Goberman through his construction activity, the depletion of his assets will be seen to have affected commerce through a diminution of his buying power. Thus, in United States v. Augello, 451 F.2d 1167 (2nd Cir. 1971), cert. den., 405 U.S. 1070, the defendant was shown to have forced the owner of a drive-in restaurant, which received meat supplies in interstate commerce, to take a few $100 protection payments. This depletion of assets was sufficient to warrant conviction under the Hobbs Act:

> Given the sweeping power of Congress under the commerce clause, Katzenbach v. McClung, 379 U.S. 294, particularly evident in the Hobbs Act, [citation omitted] it is enough that the extortion "in any way or degree", 18 U.S.C. 1951(a), affects commerce, though its effect be merely potential or subtle. [citation omitted] Here, depletion of Happy-Burger's resources, which by itself may impair the efficient conduct of its business, sufficient to affect commerce [citation omitted] was shown at the very least by the ... payment taken directly from Happy-Burger's cash register. We are therefore persuaded that the charge in this indictment provided a proper basis to invoke the Hobbs Act Id. at 1169-1170 (emphasis added).

Similarly in United States v. DeMet, 486 Fed. 816 (7th Cir. 1973), cert. den., 416 U.S. 969, United States v. Gill, 490 F.2d 233, (7th Cir. 1973), cert. den., 417 U.S. 968, United States v. Pacente, 503 F.2d 543 (7th Cir. 1974), cert. den., ___U.S.___ and United States v. Crowley, 504 F.2d 992 (7th Cir. 1974) wherein local policemen were shown to have extorted protection

money from store owners, who purchased supplies in interstate commerce, such depletion of resources was seen as affecting commerce:

> Where the victim of extortion, as here, customarily obtains inventory which has come from outside the state, obstructions and delay of and effect upon commerce may, for the purpose of the Hobbs Act, be found in curtailment of the victim's potential as a buyer of such goods. This may be traced either through the depletion of his assets by his fulfillment of the extortionate demands or the harm which would follow if the threats were carried out (emphasis added) Demet, supra, at 822.

This was also the holding in United States v. Addonizo, 451 F.2d 49, 77 (3rd Cir. 1972), cert. den., 405 U.S. 936, wherein businesses were shown to have been forced to deplete their resources through kickbacks to city officials. See also United States v. Provenzano, 334 F.2d 678, 692 (3rd Cir. 1964), cert. den., 397 U.S. 947.

The defendants' extortionate activities coupled with Goberman's involvement in interstate commerce also affected commerce in another fashion. Specifically, commerce was affected because, with Goberman's forced departure from the project, many of the building materials which had travelled in interstate commerce were ultimately installed by, and the automobile facility which was to receive cars from out of state was ultimately completed, by someone other than Goberman.[32/] This basic fact pattern, wherein

32/ As the judge instructed the jury, "... any interference with the performance of a building contract involving the use of materials ordered and shipped from out of the state specifically for that building and with the identity of the person or company who would complete the contract performance might be found by you in fact in some way or degree to affect the completion of the building ..." (Tr. 2109, MA 2257a).

the extortion victim is forced from engaging in or being involved with commerce and is replaced by someone else has also been frequently recognized as affecting commerce even in cases - unlike here where there was also a depletion of the victim's assets - where the actual volume of commerce is arguably unaffected.

Thus, in United States v. Glasser, 443 F.2d 994 (2nd Cir. 1971), cert. den., 404 U.S. 854, it was shown that the defendants, union glaziers, had destroyed plate glass windows installed by non-union personnel, in order to force the store owners to employ union glaziers for their glass installations. While the destruction and replacement actually enhanced interstate commerce, the defendants' consequent argument that commerce was thus not affected under the terms of Section 1951 was rejected by this court. Id. at 1008, N. 8. In United States v. Nadaline, 471 F.2d 340 (5th Cir. 1973), cert. den., 411 U.S. 951, an attempt was made to force an employer to fire a new employee who had previously worked for the defendant because the defendant feared the new employee would take too many business accounts from his old business. Here the commerce involved would be maintained, the only question being which of the two businesses would obtain it, yet that commerce was still seen as being affected under the terms of Section 1951. Similarly in Addonizio, supra, the commerce involved through granting municipal contracts would probably have been maintained because the contracts would have had to be given to someone in order to maintain city services; yet because contracts were given to certain companies based upon their

kickbacks to city officials, commerce was nonetheless seen as affected. Commerce was also affected though perhaps not obstructed in Batagglia v. United States, 383 F.2d 303 (9th Cir. 1968), cert. den., 390 U.S. 907, when the owner of a bowling lane who had placed a coin operated pool table purchased in interstate commerce in his establishment was forced to remove it and install one owned by the defendant which was also purchased in interstate commerce. Finally, in United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974) there might have been no commerce generated had not the defendant taken bribes for not opposing zoning changes which permitted the construction of buildings whose materials came from interstate commerce; this, too, however, was deemed an affect on commerce.

Under this view, commerce was clearly shown to have been affected in the appellants' case. This affect was precisely that the goods ordered from interstate commerce for the specific project were ultimately installed by someone other than Goberman and the car facility that would receive the commerce was completed by someone other than himself. As the trial court paraphrased this theory of the prosecution's case:

> ... Harmac [Goberman's corporation] couldn't have built this new automobile store without being engaged in commerce and ... the flow of goods from these foreign supplies into the building ... is essentially a flow of commerce. ... [W]hen you use a blackjack on a man to get him out of the completion of such a contract, you have interferred with that flow of commerce; ... (MA 97a).

The appellants also refer to the posting of the construction site by the local township and McNamara's letter of June 24 purporting to terminate the contract, and suggest that their conduct could not have affected commerce because these events were responsible for ending Goberman's relationship with the project. This position, however, is not well taken. In the first place, the posting and delivery of the letter occurred after the June 5 beating which itself resulted in Goberman's assets being partly depleted. As to the posting, the evidence at trial disclosed that McNamara himself, in order to oust Goberman, had arranged to have the site posted (Tr.G 582, MA 696a). In addition, the legal effect of the posting, as Judge Dooling observed, was not to permanently halt the construction, but merely to require that certain deficiencies be remedied (see MA 111a; 64a). With respect to McNamara's letter, this unilateral action on his part could not have served to divest Goberman of his legal interest in the contract as would the mutual recission as purportedly manifest within the coerced June 28 document. As Judge Dooling observed:

> [t]he letter was not self-fulfilling or self-executing. Hence, the transaction on June 28 was addressed to getting HarMac to relinquish the job. For all that appears, the notice sent by McNamara re New Cars, Inc. could have been an unwarranted repudiation duties that was a breach - and an element in a course of action that interferred with the HarMac performance. (MA 111a)

III

THE TRIAL COURT'S INSTRUCTIONS CONCERNING INTERSTATE COMMERCE WERE CORRECT

In his instructions, the trial judge told the jury that if it believed the government's evidence as to the defendant's extortionate conduct and Goberman's involvement in interstate commerce, then as a matter of law it might find that the government had established that "... the effect of the use of the acts of the conspirators directed against Goberman would in some degree or manner delay, obstruct, or affect in some way interstate commerce or other movement of any articles in interstate commerce" (Tr. 2103-09, MA 2251a-57a).

Merolla challenges this instruction (Mer. Br. p. 31), arguing that whether or not specified conduct affects commerce should be a jury question rather than a matter of law for the trial court to decide. The concept of commerce and what may obstruct or affect it is, however, a legal issue seeped in sophisticated theories of constitutional law. See e.g., the review of this history in Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241 (1964). As such, it is not at all uncommon for such a legal issue, though the element of a particular crime, to be considered a matter of law for the trial court's resolution. 18/

18/ In perjury prosecutions, for instance (18 U.S.C. 1621, 1623), wherein conviction must rest upon a material false statement, the issue of materiality is a matter of law. See Sinclair v. United States, 279 U.S. 263, 298 (1929); United States v. Alu, 246 F.2d 29, 32 (2nd Cir. 1957); United States v. Freedman, 445 F.2d 1220, 1226, N. 10 (2nd Cir. 1971). Similarly under 2 U.S.C. 192, which provides sanctions for refusal to answer a congressional committee's questions if pertinent to the matter under inquiry, the issue of pertinency is one for the trial court determination. Braden v. United States, 365 U.S. 431, 435-37 (1961).

In the case of Hobbs Act prosecutions, the courts have uniformly held that whether specific acts in specific circumstances affect commerce is a matter of law, while the resolution of whether the acts charged in fact were committed and whether the victim was involved in commerce remain for jury determination. As early as 1941, the court in Nick v. United States, 122 F.2d 660, 673 (8th Cir. 1941), cert. den., 314 U.S. 687 held that "[i]t is for the court to charge the jury that if certain facts covered by the evidence are shown then there is such interference." See also, Hulahan v. United States, 214 F.2d 441, 445-46 (8th Cir. 1954), cert. den., 348 U.S. 856.

The Second Circuit has also frequently reiterated this proposition. In United States v. Varlack, 225 F.2d 665, 672 (2nd Cir. 1955), the court concluded that:

> ... under our view of the applicable law, that it was proper to refuse defendant's requests to charge and to instruct the jury that if it believed the testimony of the Government witnesses with respect to the interstate or foreign nature of the commerce engaged in by the alleged victim and if it believed the testimony with respect to the conspiracy to threaten or the actual threatening to obstruct, delay or affect such commerce, then, as a matter of law, the jurisdictional elements were present and the only questions left open were whether the acts of the defendants constituted extortion or an attempt to extort and whether the defendants conspired to obtain money or property by such means.

More recently the court has reaffirmed this holding, accepting a "charge to the jury that if the evidence that ... [the victim] purchased goods in interstate commerce, and that he was the

victim of extortion, were believed, then as a matter of law, interstate commerce was affected." United States v. Augello, 451 F.2d 1167, 1170 (2nd Cir. 1971). See also United States v. Riccardi, 357 F.2d 91, 94 (2nd Cir. 1966), cert. den., 384 U.S. 942.

Other courts of appeals have also been in accord with this position. See United States v. Hyde, 448 F.2d 815, 839 (5th Cir. 1971), cert. den., 404 U.S. 1058; United States v. Provenzano, 334 F.2d 678, 692 (3rd Cir. 1964), cert. den., 379 U.S. 947; United States v. Lowe, 234 F.2d 919, 922 (3rd Cir. 1956), cert. den., 352 U.S. 838; United States v. Green, 246 F.2d 155, 160-61 (7th Cir. 1957),[19/] cert. den., 355 U.S. 871.

Indeed, this standard practice was recognized by the Supreme Court in Stirone v. United States, 361 U.S. 212 (1959). In that case, a conviction under the Hobbs Act was reversed because the jury had been permitted to find guilt, in the alternative, on a theory not charged in the indictment. However, while reversing on this basis the Court did acknowledge without objection

19/ Merolla's attempt to distinguish Lowe, supra, on the grounds that no causal element of affecting commerce was involved (Mer. Br. p. 35) is incorrect for the specific complaint of the defendant in that case was that the trial court's instruction "... did not leave to the jury the determination of whether the alleged conduct ... affected commerce..." Id. at 922. Similarly in Green, supra, which Merolla attempts to distinguish, the court of appeals clearly perceived the trial court's instruction not as merely informing the jury that interstate commerce was involved but rather that the government's facts, if believed, established an affect on commerce as a matter of law. Id. at 160-161.

the trial court's use or an instruction similar to that utilized here,[20] observing that

> ... the trial judge charged the jury that so far as the interstate commerce aspect of the case was concerned, Stirone's guilt could be rested either on a finding that (1) sand used to make the concrete "had been shipped

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20/ The full instruction given in Stirone, mirroring that of Judge Dooling for purposes of determining affect on commerce is found in the government's brief in Stirone, 11 Records and Briefs in United States Cases - U.S. Supreme Court, October Term, 1959, No. 34, pp. 5-6:

> Consider the evidence of the Government on this question in the light of any other circumstances or other evidence bearing on the interstate nature of the shipment of sand or the sand used in making concrete supplied by Mr. Rider and on the use to which the mill under construction would be and was put. Then if you are satisfied beyond a reasonable doubt that the sand had been shipped from another state into Pennsylvania by any means of transportation and was used in making concrete supplied by Mr. Rider and that Mr. Stirone extorted money from Mr. Rider, the alleged extortion would be an act which obstructed, delayed or affected interstate commerce, and the movement of commodities in interstate commerce.
>
> Or if you are satisfied beyond a reasonable doubt that Mr. Rider's concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce and if you also believe that the defendant extorted money from Mr. Rider, you are instructed as a matter of law that there has been a substantial effect on interstate commerce shown by the United States. In other words, if you find the facts to be as the Government contends, interstate commerce has been affected, obstructed and delayed.

from another state into Pennsylvania" or (2) "Mr. Rider's concrete was used for constructing a mill which would a manufacture articles of steel to be shipped in interstate commerce ... " Id at 214. 21/

IV

THE COURT GAVE ADEQUATE INSTRUCTIONS ON THE CREDIBILITY OF THE WITNESSES

It is also contended that the trial court presented inadequate cautionary instructions with respect to the jury's assessment of Goberman's credibility. In fact, the court's instructions were far more elaborate than those presented in the defendant McNamara's brief (p. 34) and as such were

21/ That the resolution of what "affects commerce" is a matter of law was also suggested by the Supreme Court more recently in United States v. Bass, 404 U.S. 336 (1971). In Bass, the defendant was convicted under 18 U.S.C. App. 1202(a) which prohibits certain persons from receiving, possessing, or transporting any firearm "in commerce or affecting commerce." This conviction was reversed because the government, incorrectly believing that the clause "in commerce or affecting commerce" applied only to a charge of transporting firearms, had not endeavored to charge or prove, in a claim of possession, that the possession had occurred in commerce or affecting commerce. While reversing, the Court in noting how a proper interstate nexus might be shown indicated that the issue was a matter of law:

> Significantly broader in reach, however, is the offense of "receiv[ing] ... in commerce or affecting commerce," for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce (emphasis added). Id. at 350.

See also this court's decision in Ricardi, supra, upholding a conviction under 29 U.S.C. 186, which prohibits union representatives of personnel employed in industry affecting commerce from demanding payments from employers. Here, contrary to Merolla's characterization of the statute (Mer. Br. p. 35) the enactment contained the causal element of "affecting commerce," yet the court deemed the issue a matter of law. Id. at 94.

firmly calculated, we submit, to emphasize to the jury the fact that the government's evidence should be carefully scrutinized.[22] These instructions, we note, are in substantial

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22/ You are the sole judges of the credibility of the witnesses. The motives and state of mind of each witness as they appear to you and the circumstances and inducements under which the witness testified are to be taken into account. Consider any relation each witness may bear to either side of the case and the manner in which the verdict might affect him.

You may consider the appearance and manner of each witness on the witness stand, the witness'a apparent candor or lack of it, and the character of the testimony given, whether the testimony contains inconsistencies or discrepancies, whether it is intrinsically credible or seems to you in whole or part improbable, and whether it conflicts with other testimony or is consistent with other testimony in the case.

In weighing the effect of conflict or discrepancy consider whether it pertains to a matter of importance or to unimportant details and whether it seems to you to result from innocent error or from falsehood. If you find a witness has been mistaken or untruthful, in all or in part of the testimony given, then you may give the testimony of that witness such credit, if any, as you think it deserves in the light of the nature of and the extent of the defects that you find in it.

Evidence that at an earlier time a witness made a statement inconsistent with or contradictory of that witness's testimony here in your presence justifies you in rejecting the testimony given before you on that point but does not require you to reject the testimony.

(Con't on next page)

comport with those approved in Hoffa v. United States, 385 U.S. 293, 312, N. 14 (1966).[23] Coupled with Goberman's impeachment by prior offenses,[24] the defense counsels' extensive cross-examination of him and their closing arguments which emphasized the issue of his credibility, (see Tr. 1934-39, MA 2078a-2083a; Tr. 1994-97, MA 2140a-2143a; Tr. 2021-23, MA 2169a-2171a) it is inconceivable that the jury would not have carefully weighed Goberman's testimony before reaching its verdict.

22/ (Con't from previous page)

> You must decide in the light of the inconsistency and all the other factors bearing on the credibility of the testimony whether you do or do not accept it as true. You do not, however, take the earlier statement as establishing the true facts; rather, you treat it as at most nullifying the testimony given in court here.
>
> If you conclude that a witness has knowingly testified falsely concerning any material matter, you have the right to distrust that witness' testimony in other particulars. You may reject all the witness' testimony or give it or parts of it the credence you think it deserves.
>
> In considering the credibility of a witness you may take into account the fact that he has been previously convicted of a crime or crimes. You may also take into account evidence that a witness has admitted the commission of other acts that were in violation of the law. (Tr. 2118-2120, MA 2266a-2268a)

23/ United States v. Partin, 493 F.2d 750 (5th Cir. 1974), cited by McNamara, is inapposite for that holding, involved a situation in which the trial court, during its instructions, "... made no reference whatever to these credibility factors, that is, testimony of interested witnesses, impeachment of witnesses by proof of felony convictions." Id. at 761. Here, by contrast, these actors were all covered in the trial court's instructions.

24/ Goberman disclosed that he had been convicted of two felony offenses (Tr.G 259, MA 371a; Tr. 777, MA 894a; Tr. 381-390, MA 492a-501a). In addition, he had been granted immunity and had testified in a state murder case (Tr. 381-390, MA 492a-501a).

Nor can any substance be imputed to McNamara's argument that Goberman's testimony should have been struck en toto on grounds of an "alleged disregard for the oath." (Mc Br. p. 31). While Goberman admitted to having made false statements in other contexts (See Tr.G 498, MA 610a; Tr.G 373, MA 484a; Tr.G 541-545, MA 653a-657a) he affirmed that "[i]n a courtroom I would not lie under any circumstances" (Tr.G 600, MA 715a). His ultimate credibility was a matter for the jury to decide, not the trial judge. See Hoffa v. United States, supra at 311; United States v. Weinstein, 452 F.2d 704, 413 (2nd Cir. 1971). As to the suggestion that this court should resolve the credibility of a witness, we note "[t]his court cannot substitute itself for the jury in determining the credibility of the witnesses and the weight of the evidence." United States v. Brown, 335 F.2d 170, 172 (2nd Cir. 1964); United States v. Arterbridge, 374 F.2d 506, 506 (2nd Cir. 1967).[25/]

25/ McNamara also complains that Goberman had removed certain of his records to North Carolina. (Mc Br. p. 31, n. 66). This is in reference to Goberman's testimony on cross-examination that he stored some of his records in North Carolina when he moved there in 1973 (Tr.G 565, MA 678a; Tr.G 998, MA 1118a; Tr.G 1002, MA 1122a). Given the documentation that was available at trial, however, we fail to perceive how these records of his business would have vitiated the government's contention that he had been beaten and extorted out of certain property rights. The trial judge agreed with this observation when, during the defense counsel's cross-examination concerning these records he concluded:

> This is way besides the point, Mr. Meiselman. Please move along. (Tr. 566, MA 679a)
>
> * * *
>
> We are so far from the point in this case Mr. Meiselman. That is not to be pursued. (Tr. 567, MA 680a)

In any event, the predicate of appellants' argument - that the case rested solely upon the uncorroborated testimony of Harold Goberman - is inaccurate. In fact, as a review of our Statement reveals, his claim of extortion was more than adequately corroborated. As to the June 5 beating and extortion, the construction superintendent Gary Taibbi corroborated that the defendant Merolla and others came to the site on that date looking for Goberman and that they had also previously appeared and made threatening comments (Tr. 866, MA 984a; Tr. 863, MA 981a; Tr. 867-68, MA 985a-986a). Goberman's brother, Allen, who cannot be considered overly biased towards his sibling since the latter had negotiated the construction contract for himself (see note 3, supra), testifed that he accompanied his brother to the McNamara showroom on June 5, observing that he was upset at the time. Allen Goberman also stated that from outside the room where his brother was meeting with McNamara, Merolla and others, he heard a loud commotion within and on entering the room saw a gun being passed between Deliso and Merolla. He also quoted McNamara as telling his son to get Goberman to sign the trailer registration (Tr. 1222, MA 1350a; Tr. 1233, MA 425a; Tr. 2242-43, MA 1371-72a; Tr. 1254, MA 1384a).

As to the June 28 beating and forced contractual recission, McNamara's own attorney at the time, Desmond O'Sullivan, testified that after June 5, McNamara was sufficiently anxious to remove Goberman from the project as to request the local prosecutor's office to bring fraud charges against him (Tr. 1152-53a, MA 1275a-77a; Tr. 1201-04, MA 1327-30a). This failing, the June 28

beating occurred. That the pummelling did transpire was fully corroborated. One of the policemen who picked Goberman up soon after the event testified that his leg movement was impaired (Tr. 1698-99, MA 1832a-33a). Emanuel Sfaelos, Goberman's attorney who met him at the police station, observed his jacket torn and was asked by Goberman to assist him to the car (Tr. 1503-05, MA 1634a-36a). Taibbi also reported seeing Goberman's face as bruised later that day and the doctor he visited recalled him as suffering from various lesions caused by a blunt body (Tr. 915, MA 1033a; Tr. 1116, MA 1237a).

That Goberman's signatures on the contract release and document acknowledging the receipt of $25,000 were not voluntary, and that the money never passed into his hands, was further attested to by J. Timothy Shea, another of McNamara's attorneys,who indicated that he declined to proffer the release agreement as a defense in a civil case arising out of the dispute between McNamara and Goberman because in his view the money had never been transferred (Tr. 1643, MA 1776a).

In addition, evidence of the defendants' suspicious behavior during the government's investigation further substantiated Goberman's testimony. McNamara claimed that Goberman had in fact been threatening him. Yet when he consulted his attorney, O'Sullivan, and a local prosecutor with a view to removing Goberman legally from the project, these alleged threats were, mysteriously, never mentioned (Tr. 1150-51, MA 1273a-74a; Tr. 1191-96, MA 1317a-22a; Tr. 1200-01, MA 1326a-27a; Tr. 1154, MA 1278a; Tr. 986-987, MA 1106a-07a).[26/]

26/ This seems also to dispositively confute McNamara's characterization of the instant case as the "... effectuation of a scheme to extort money from ... [a] successful, well-to-do businessman" (Mc Br. p. 8).

McNamara also claimed, through his attorney Shea, that the contract release never existed, then changed the explanation to contend that it was no longer in existence, although such a document, if legitimate, would be of integral importance to his business venture (Tr. 1475, MA 1606a; Tr. 1478-82, MA 1609a-13a; Tr. 1422, MA 1552a, Tr. 1384, MA 1514a).

As to the defendant Merolla, he was shown caught in the striking inconsistency of denying knowledge of Goberman when the latter's name and phone number were found on a card in his wallet. In addition, Allen Goberman witnessed a gun passing between him and DeLiso after the June 5 beating (Tr. 1242-43, MA 1371a-72a), concerning which Harold Goberman had indicated that a pistol had been shoved down his throat (Tr.G 313, MA 425a; Tr. 1402-03, MA 1532a-33a; Tr. 1464, MA 1595).

V

THE AUTHORITY OF DEPARTMENT OF JUSTICE ATTORNEYS TO PRESENT A CASE TO THE GRAND JURY MAY NOT BE CHALLENGED FOR THE FIRST TIME ON APPEAL. IN ANY EVENT, AN INDICTMENT SIGNED BY THE UNITED STATES ATTORNEY IS NOT SUBJECT TO DISMISSAL WHERE THE EVIDENCE UPON WHICH IT IS BASED IS PEESENTED TO THE GRAND JURY BY DEPARTMENT OF JUSTICE ATTORNEYS

Although the appellants did not object in the trial court to the presence before the grand jury of regular Department of Justice,Criminal Division attorneys, they now claim for the first time that the indictment must be dismissed because these attorneys were not properly authorized to appear before the grand jury (Mc Br. pp. 24-26). We submit, as we did in United States v. Tavoularis, No. 75-1027 (2nd Cir., argued April 18, 1975), that

this claim should have been raised prior to trial and may not be raised for the first time on appeal.

Rule 12(b)(2), F.R.Crim.P., provides in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to present such defenses or objections "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." In Davis v. United States, 411 U.S. 233, 236-37 (1973), the Supreme Court held that this rule "applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial court." It, therefore, concluded that a post-conviction claim of unconstitutional discrimination in the composition of the grand jury was waived.[27/]

27/ In Davis, the court also said (411 U.S. at 241):

> If ... time limits are followed, inquiry into an alleged defect may be concluded and, if necessary cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout .. . time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim of hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

The claim here - that government attorneys were not authorized to present the case before the grand jury - is also the type of claim that should have been presented prior to trial. An examination of the Advisory Committee's Notes to Rule 12(b)(2), shows that the drafters meant to include the objection made here within this Rule. The Notes state in part:

> All such defenses and objections must be included in a single motion . . . Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury ... presence of unauthorized persons in the grand jury room, other irregularities in the grand jury proceedings . . .

In light of this Rule, appellants' objection to the authority of the government attorneys has been waived. See also United States v. Crispino, 74 Cr. 923 (S.D.N.Y., decided February 13, 1975) where the court stated, "A motion to dismiss an indictment based on the presence of an unauthorized person before the grand jury must be made prior to trial or it is waived." Cf. United States v. Sisca, 503 F.2d 1337, 1349 (2nd Cir. 1974); Sutherland v. International Ins. Co. of New York, 43 F.2d 969, 971 (2nd Cir. 1930).

Moreover, there is less reason here to give relief from the waiver provision of this rule than in Davis where the specific constitutional claim was discrimination against blacks in the composition of the grand jury. Here, the two defendants could have raised the issue below. They knew that Strike Force attorneys were involved in the prosecution of this case and they could have found out prior to trial whether these attorneys appeared before the grand jury. In these circumstances, appellants could have

questioned the authority of these attorneys. Since they did not raise this issue below, appellants have waived the right to raise this issue and are thus now foreclosed from doing so.

Even if this issue had been raised below, we submit that an indictment is not subject to dismissal on the ground that unauthorized persons appeared before the grand jury where these persons are government attorneys. It is our position that any Department of Justice attorney may appear and conduct an inquiry before the grand jury, that the scope of his authority before the grand jury may not nullify or circumscribe the action of the grand jury and that if the attorney did conduct an inquiry in excess of his authority, only the Attorney General may complain.

The attorneys involved here are regular Department of Justice attorneys. Such attorneys, after all, are "attorneys for the government" within the meaning of Rule 6(d) and 54(c) F.R.Crim.P., who are permitted to appear before the grand jury. As the court said in United States v. Kazonis, No. 74-238-5 (D. Mass.), in rejecting a claim such as was made here:

> The tradition of the common law thus accommodated the presence in the grand jury of any lawyer chosen by the individual prosecutor for the purpose of presenting the evidence, without regard to his particular commission or authority. The presence of the Special Attorney is clearly no violation of a fundamental rule but is in accord with an ancient tradition.

See also May v. United States, 236 Fed. 495, 500 (8th Cir. 1916).

We perceive no valid reason why a defendant should have a right to nullify grand jury proceedings on the ground here urged. A defendant's right to a fair grand jury proceeding

is in no way prejudiced by the scope of authority of the particular attorney before the grand jury. But beyond this lack of prejudice, there is no more reason to dismiss an indictment on this ground than there would be to dismiss on the ground that there was inadequate or incompetent evidence before a grand jury. Such a challenge "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." Costello v. United States, 350 U.S. 359, 364 (1956). It would also circumscribe the powers of the grand jury to conduct an inquiry and return indictments despite the fact that the Supreme Court has ruled that such an inquiry may not "be limited narrowly by ... forecasts of the probable results of the investigation." United States v. Calandra, 414 U.S. 338, 343 (1974); Blair v. United States, 250 U.S. 273, 282 (1919). See also United States v. Kazonis, supra. The contention here, moreover, whether a particular attorney is authorized to represent the United States before a grand jury in a matter of concern only for the Attorney General and not for a particular criminal defendant. The claim here simply falls into the category of a "housekeeping provision of the Department of Justice." If the letter of authority given to the particular government attorney should have been worded differently, this is a matter over which a defendant should have no right to complain. See Sullivan v. United States, 348 U.S. 170, 173 (1954), where the Supreme Court, in discussing an Executive Order which the United States Attorney had failed to comply with, stated:

> It was simply a housekeeping provision of the Department and was not intended to curtail or limit the well-recognized power of the grand jury to consider and investigate any alleged crime within its jurisdiction . . .
>
> . . . The evidence was presented by the District Attorney, who was a representative of the Department of Justice, notwithstanding that he failed to comply with the departmental directive. For this he is answerable to the Department, but his action before the grand jury was not subject to attack by one indicted by the grand jury on such evidence.

Here, too, there may be no valid attack on the grand jury proceedings. In addition, the indictment here was signed by the United States Attorney. This in itself shows that the attorneys involved here were authorized to act and were assisting the United States Attorney within the broad authority given to the Attorney General under 28 U.S.C. §§542 and 543(a), to appoint attorneys to assist United States Attorneys. See United States v. Jacobson (S.D.N.Y., 74 Cr. 936, decided March 3, 1975).

Finally, the letters of authorization here specifically gave the two attorneys involved the authorization to investigate crimes under 18 U.S.C. 1951.[28/] And even Judge Werker in United States v. Crispino (S.D.N.Y., 74 Cr. 932, decided February 13, 1975),

28/ The letters are appended to McNamara's Brief, pp. 1a-3a.

who disapproved of broad authorizations, would have concluded that the authorizations of this case constituted valid authorizations. (slip opinion at p. 19).[29/]

VI

THE APPELLANTS' OTHER CONTENTIONS ARE ALSO WITHOUT MERIT

McNamara argues that because all the defendants at trial were not convicted, the jury's verdict was inconsistent and thus reversibly flawed. Assuming momentarily that the jury's verdict was inconsistent, this contention ignores that"[i]t has ... long been the rule that consistency in verdicts or judgments of conviction is not required." Hamling v. United States, ___U.S. ___,___ (94 S.Ct. 2887, 2899). However, we question whether the verdict can in fact be perceived as inconsistent, for as the Statement reveals, the evidence against the appellants was far stronger than that against the other defendants. In the case of DeLiso, for instance, Allen Goberman testified that while he currently believed DeLiso had been in the room with Harold during the June 5 beating (Tr. 1314, MA 1445a), he admitted that he had initially told investigators that he thought DeLiso had waited outside the room (Tr. 1309-1313, MA 1440a-1444a). As to Alphonse

29/ The issue as to the authority of Special Attorneys is currently before this Court in In re Persico (No. 75-2030, argued March 19, 1975) and In re DiBella (No. 75-1121, argued April 11, 1975).

Merolla (Fat Nicky), two defense witnesses acknowledged seeing the appellant Merolla at the McNamara showroom on June 28, but did not recall seeing his brother, Fat Nicky (Tr. 810-811, MA 928a-29a, Tr. 1763, MA 1901a).

Nor is there any merit to McNamara's contention that the government was required to prove that he conspired specifically to interfere with interstate commerce. McNamara relies upon the so called Crimmins rule enunciated by Judge Hand in United States v. Crimmins, 123 F.2d 271 (2nd Cir. 1941). In that case, a defendant who sold securities stolen by others in another state was prosecuted for conspiring to transport stolen securities in interstate commerce. This court reversed, holding that while knowledge that the bonds had travelled in interstate commerce was not necessary to support conviction for the substantive offense, it was a required element of the conspiracy offense. Crimmins, however, has been recently rejected by the Supreme Court in United States v. Feola, slip op. No. 73-1123, decided March 19, 1975, wherein the Court held that "... where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a mens rea requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense." Id. at 24. In substantive Hobbs Act prosecutions, of course, knowledge of the federal element is not required: "It is not necessary that the purpose of the extortion by to affect interstate commerce ...[citation omitted] but only that one of the natural effects thereof be an obstruction of that commerce." United States v. Addonizo, 451 F.2d 49, 77

(3rd Cir. 1972). See also United States v. Nakaldski, 481 F.2d 289, 298-99 (5th Cir. 1973).

Indeed, we also note that in spite of the general Crimmins doctrine, this court and other circuits never applied that notion to conspiracy charges under Section 1951. As this court observed in United States v. Varlack, 225 F.2d 665, 672 (2nd Cir. 1955), quoting from United States v. Nick, 122 F.2d 660, 673 (8th Cir. 1941), "'... it is not necessary for the jury to find that the defendants, in conspiring, considered that the effect of their conspiracy would be to affect interstate commerce or that one of the purposes of the conspiracy was to affect such commerce. ... All that is necessary is that the conspiracy shall be to do something, the natural effect of which will be to affect interstate commerce.'" See also United States v. Amato, 495 F.2d 545, 548 (5th Cir. 1974); United States v. Pranno, 385 F.2d 387, 389-90 (7th Cir. 1967).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of conviction should be affirmed.

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

DAVID J. RITCHIE,
Special Attorney,
Brooklyn, New York.

ROBERT H. PLAXICO,
Attorney,
Department of Justice,
Washington, D. C. 20530.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copes of the foregoing Brief of Appellee have this day been mailed to counsel for Appellants at the following addresses:

Thomas J. Aquilino, Esquire
Davis Polk & Wardwell
1 Chase Manhattan Plaza
New York, New York 10005

Phylis Skloot Bamberger
c/o William J. Gallagher, Esquire
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, New York 10007

DATED: April 21, 1975

ROBERT H. PLAXICO, Attorney,
Criminal Division
Department of Justice
Washington, D. C. 20530
Tele. No. (202) 739-5030

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

April 21, 1975

Honorable A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
New York, New York 10007

Re: United States v. Alphonse M. Merolla and Thomas McNamara, Nos. 75-1011 and 75-1017

Dear Mr. Fusaro:

Enclosed herewith for filing are twenty-five (25) copies of the Brief for Appellee in the above-captioned case.

Copies have this day been mailed to counsel for appellant.

Very truly yours,

Robert H. Plaxico

Robert H. Plaxico
Attorney
Department of Justice
Washington, D.C. 20530

cc: Thomas J. Aquilino, Jr.
Davis Polk & Wardwell
1 Chase Manhattan Plaza
New York, New York 10005

Phylis Skloot Bamberger
c/o William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, New York 10007